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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 770

BETHLEHEM STEEL COMPANY,

Petitioner,

v.

CHARLES T. SAMUELSON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

An adequate reference to the opinions delivered in the courts below is made in the Petition.

JURISDICTION

The jurisdictional requisites are set forth in the petition.

QUESTIONS PRESENTED

It is respectfully submitted that the following questions, rather than the questions urged by the Petitioner, are the ones correctly here presented.

1. In affirming the trial court's finding that the patent in suit was valid, which finding involved conflicting testi

mony and the credibility of witnesses, did the Court of Appeals err by stating in its opinion, "Any reasonable doubt will be resolved against the party alleging the invalidity of the patent (citing cases). Bethlehem has not met this burden. No prior invention disclosed the same combination of devices as the claims at issue in the Samuelson patent, and it is not at all clear that the entire invention would have been obvious to a person having ordinary skill in the art. * * * * "We cannot now, with the benefit of hindsight, say that the particular combination of devices embodied in the Samuelson patent was as obvious in 1949 as it is fourteen years later. We affirm the validity of the patent in suit."? (323 F. 2d 944, 948)

2. Was the Court of Appeals entitled to reverse the trial court's finding of non infringement where there is no dispute in the record on the controlling facts upon which the Court of Appeals based its action?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions are adequately set forth in the Petition.

STATEMENT OF THE CASE

This is a civil action by Charles T. Samuelson for infringement by Bethlehem Steel Company of claims 1 and 10 of United States Letters Patent No. 2,589,146 granted to him March 11, 1952 for an invention in a Submersible Deep Water Drilling Apparatus. (R. 6, 19, 599) The only structure of Bethlehem accused of infringement is a large mobile offshore drilling rig named "Mr. Gus II" which was built and sold by Bethlehem at Beaumont, Texas in 1956-57. (R. 448-449)

The patent in suit relates generally to a mobile offshore drilling structure to be floated to a drilling site, set up for drilling operations, and after the drilling operation is completed, refloated for the purpose of relocating the structure at a new drilling site.

As stated by the Petitioner (Petition p. 6), "The trial judge succinctly described the accused rig, Mr. Gus II, in his Finding of Fact 29 (R. 610) and the Court of Appeals adopted his description (Appendix, *infra*, p. 4a)". Respondent concurs in this description as there is no issue in the evidence as to the construction and mode of operation of Mr. Gus II.

The trial before the United States District Court for the Eastern District of Texas in Beaumont took five days. With respect to validity the plaintiff testified in his own behalf, introduced testimony of a naval architect, introduced admissions of the designer of Mr. Gus II, and cross-examined defendant's witnesses.

In an attempt to sustain its burden of proving invalidity of the patent in suit Bethlehem introduced certain patents, publications, private documents, *and*, as stated in its Petition (p. 7):

> "... It relied on the testimony of the designer of Mr. Gus II, two heads of college engineering departments who had practical experience in the off-shore field, and two practicing engineers in the field to explain its concept of the engineering significance of the patent, the prior art, and Mr. Gus II."[1]

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[1] On page 6 of its Petition Bethlehem states, "The Court of Appeals summarized Bethlehem's contentions about the relationship of Mr. Gus II and the patent in suit to the prior art in its opinion (Appendix, infra, pp. 4a-5a)". Petitioner cannot improve on this summarization." It should be borne in mind that the portion of the opinion which Bethlehem is there referring to sets forth Bethlehem's *contentions*, not the court's holding, as to certain of the prior art. Much more than this went into the determination of validity.

The evidence on validity created sharp conflicts and involved credibility of witnesses.

As to infringement there is no issue as to the construction and mode of operation of Mr. Gus II for the plaintiff relied upon stipulated drawings, manuals, and photographs of Mr. Gus II produced by Bethlehem, Bethlehem's answer to interrogatories, and admissions by the designer of Mr. Gus II. (Pltf's Ex. 3 at R. 23-29, 147-149, Pltf's Exs. 10-G, 10-H, 10-I, 10-J, 10-M, 10-N, 10-T, 10-U, 10-V at R. 32, 33, 36, 37, 42, and 43, Interrogatories at R. 46, Admission at R. 265, 266, 461, 462)[2] The only comparison made by anyone of the claims of the patent in suit to Mr. Gus II was that made by the plaintiff's expert naval architect. (R. 139-155) Bethlehem very carefully did not ask its expert or any of its other witnesses to compare Mr. Gus II with the patent claims.

The trial court found the claims involved to be valid but not infringed. In its opinion letter of December 29, 1961 the trial court stated, "The Court is of the opinion that Plaintiff was taken advantage of by the defendant. . . ." (R. 615, 595)

Upon appeal the Court of Appeals affirmed the finding of validity and reversed the finding of non-infringement.

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[2] The question at the top of page 266 of the record should read: "Question: Then, as I understand, Mr. Gus II would function the same way, whether the columns pass through permanently buoyant tanks or floodable tanks, but for the strength of the mat you preferred to have them in the structure you do have them?" A portion of this question was inadvertently omitted from the printed record but it is present in the original transcript of testimony forwarded to the Court of Appeals at page 378 thereof.

ARGUMENT

Rule 19, which fixes the standard for granting writs of certiorari, requires there be "'special and important'" reasons for the writ. None such exist here. As the trial court found, "This case therefore involves the conventional issues in patent infringement suits . . .". (R. 598) This is just another patent suit turning on the particular facts involved in which the one who twice lost on validity and last lost on infringement seeks further review.

No Conflict Of Decision Involving The Validity And Infringement Of The Patent In Suit Exists But It Is Not True, Contrary To Bethlehem's Assertions, That As A Practical Matter The Patent In Suit Cannot Be Litigated Other Than In The Fifth Circuit.

Bethlehem (Petition pp. 10-11) seeks to excuse the admitted lack of conflicting decisions involving the patent in suit by asserting that structures of the type covered by the patent in suit do not operate other than in the Fifth Circuit and relies upon decisions in which certiorari was granted where the industry affected was concentrated in one location.

There is no evidence in the record, and Bethlehem apparently does not assert it to be true, that the patent in suit dominates any industry.

Without citing a record reference (and Respondent knows of none), Bethlehem (Petition p. 10) states that the California "coast is *notoriously* rocky and steeply shelving and rigs of the type here involved have not been used and are not suitable for use there." Respondent does not know of any such testimony. If by its use of the word "notoriously" Bethlehem is asking this Court to take judicial notice

of whether or not mobile offshore drilling rigs can operate outside the Fifth Circuit, Respondent joins with Bethlehem in such a request because a reference to the trade magazine "Offshore & Gulf Coast Oil Reporter", December, 1963, pages 39-42, published by Industrial Trade Publications, Conroe, Texas (reproduced in the appendix hereto) shows that mobile units are operating outside the Gulf Coast.

Additionally, the only other structure mentioned in the record as being one which infringes the patent in suit is the "S-66" owned by a company located in San Francisco, California. (R. 129, 201, Pltf's. Ex. 21A, R. 714)

There Is No Conflict Between The Reasoning Of The Fifth Circuit In Upholding The Validity Of The Patent In Suit And Applicable Decisions Of This Court And Other Courts Of Appeal.

Bethelehem here finds itself in the same position as the defendant in the *Graver Tank & Mfg. Co. v. Linde Air Prod. Co.*, 336 U.S. 271, 274, 93 L. Ed. 672, 676, where this Court stated when asked to review the question of *validity*:

> "Rule 52(a) of the Federal Rules of Civil Procedure provides in part: 'Findings of Fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses'. To no type of case is this last clause more appropriately applicable than to the one before us, where the evidence is largely the testimony of experts as to which the trial court may be enlightened by scientific demonstrations. This trial occupied some three weeks, during which, as the record shows, the trial judge visited laboratories with counsel and experts to observe actual demonstrations of welding as taught by the patent and of the welding accused of infringing it, and of various stages of the prior art
>
> "

Bethlehem attempts to avoid the attitude expressed above by asserting in its "Questions Presented" and "Reasons For Granting The Writ" (1) that it attacked the patent relying solely upon uncontested publications and other documents and (2) because this was the nature of its attack the Court of Appeals erred in affirming the lower court's holding of validity when it, the Court of Appeals, used the words "any reasonable doubt will be resolved against the party alleging the invalidity of a patent." (Petition pp. 2, 9)

This asserted justification for seeking certiorari fails for several reasons. One reason is that, contrary to Bethlehem's assertion, undisputed prior publications and patents were not the sole factors used to determine validity. Bethlehem did use documentary evidence as a part of its attack upon validity but it admitted through its expert that no one prior art publication revealed the structure of any one of the claims in issue. (R. 525, 526) As Bethlehem admits in its Petition (p. 7) it relied upon several witnesses to explain "its concept" of various matters relating to validity.

The plaintiff through his own testimony, the testimony of a naval architect, and cross-examination of Bethlehem's witnesses showed how the plaintiff had a lifetime of experience in building marine structures (R. 47-59), the problems in the design of offshore drilling structures (R. 60-62), the unsuccessful attempts to solve these problems prior to the plaintiff's application for the patent in suit (R. 60-63, 105-112, 243-248), the differences between the prior art and the claims of the patent in suit, how the plaintiff (after filing his patent application but before the issuance of the patent in suit) submitted various documents to Bethlehem disclosing his invention and asking if Bethlehem would be interested in obtaining rights under his patent application, how Bethlehem declined and returned the docu-

ments to the plaintiff but unknown to and unauthorized by the plaintiff kept copies of these documents (R. 23, 26, 29, 64-66, 94), how Bethlehem in 1954 built a mobile offshore drilling structure known as "Mr. Gus I" which did not infringe the patent in suit as it operated on a different principle (R. 113-116, 155, 437-439), how Bethlehem unblushingly announced to the world at the time of the launching of Mr. Gus I that Mr. Gus I was "the result of a development based on the best scientific and engineering knowledge available. Several hundreds of thousands of dollars have been spent on basic research and design." (Pltf.'s Ex. 10-K at pages 3, 5, and 7, R. 39, 422-429, 432, 477-479), how there was difficulty in the basic design of Mr. Gus I from its maiden voyage until it finally tilted and turned over in about thirty feet of water in the Gulf of Mexico (R. 23, 27-29, 440), how Mr. Gus II was designed (R. 243, 249, 250) and because of limitations in the design of Mr. Gus I it was not duplicated in Mr. Gus II (R. 28, 29), and how Bethlehem was aware of the patent in suit when it constructed Mr. Gus II (R. 469). The history of this offshore art is recited by the trial court in its findings of fact and by the Court of Appeals in its decision. (R. 603-608, 618, 323 F. 2d 945, 946)

Credibility of witnesses and the meaning of certain publications relied upon by Bethlehem were at issue. For example, Bethlehem introduced much of its prior-art testimony through Mr. Nedderman who had had very little experience with offshore structures — having contributed to the design of only two. One of these (Trans Gulf 10) fell over into the water like Mr. Gus I — Bethlehem's earlier effort. **(R. 520, 521)**

Nedderman was asked what prior art he considered to be the most pertinent to claim 1 and what the most pertinent to claim 10. After taking ample time to answer, he concluded that Patent No. 2,603,068 to Wilson (Wilson 068)

and the British Patent No. 580 (British 580) were the closest of the prior art to claim 1 and they were both of equal pertinence. He next concluded that the Hansen patent No. 2,430,914 by itself was the most pertinent to claim 10. (Tr. 526-527, 532)

After the evening recess Neddermeyer twice changed his testimony on this point. He first changed it to say that British 580 was not only one of the two most perfinent patents to claim 1 but that it was also one of the two most pertiinent patents to claim 10 and that it was of equal pertinency with Wilson 068 to claim 1 and Hansen to claim 10. Later he changed his testimony again to say that Wilson 068 alone was most pertinent to claim 1. (Tr. 541, 542, 548, 558)

Christenson, the plaintiff's witness, explained how Wilson 068 will not function in the manner described in Wilson 068, how the proposed structure of a Russian reference would not function, and that the most pertinent prior art was considered by the patent office before it issued the Samuelson patent. (R. 585-588, 591)

The foregoing and other testimony of witnesses clearly reveals that documents alone were not the basis of the determination of the patent's validity and so the condition precedent upon which Bethlehem asserts it is erroneous to apply the "beyond a reasonable doubt" test fails.

Pertinent to this case are Mr. Justice Cardozo's statements in *Radio Corporation of America* v. *Radio Engineering Laboratories, Inc.*, 293 U.S. 1, 7, 79 L. Ed. 163, 167:

> ". . . A patent regularly issued and even more obviously a patent issued after a hearing of all the rival claimants, is presumed to be valid until the presumption has been overcome by convincing evidence of error. The force of that presumption has found varying ex-

> pression in this and other courts. Sometimes it is said that in a suit for infringement, when the defense is a prior invention, 'the burden of proof to make good this defense' is 'upon the party setting it up', and 'every reasonable doubt should be resolved against him'. (Citing cases.) Again it is said that 'the presumption of the validity of the patent is such that the defense of invention by another must be established by the clearest proof — perhaps beyond reasonable doubt'. (Citing cases.) The context suggests that in these and like phrases the courts were not defining a standard in terms of scientific accuracy or literal precision, but were offering counsel and suggestion to guide the course of judgment. Through all the verbal variances, however, there runs this common core of thought and truth, that one otherwise an infringer who assails the validity of a patent fair upon it face bears a heavy burden of persuasion, and fails unless his evidence has more than a dubious preponderance . . ." (Citing cases.)

Bethlehem does not deny that the "reasonable doubt" test applies to disputed issues of fact on which the determination of validity must be made and there is no showing that the "'reasonable doubt" rule was applied in this case other than to disputed facts for in affirming validity the Court of Appeals held:

> ". . . No prior invention disclosed the same combination of devices as the claims at issue in the Samuelson patent, and it is not at all clear that the entire invention would have been obvious to a person having ordinary skill in the art." (323 F. 2d 947)

This is the test of 35 U.S.C. § 103 which statute, Bethlehem admits (Petition, p. 19) is the test to be applied in determining if the patent in suit is valid.

In numerous cases where the determination of validity involved questions of fact the Courts of Appeals have stated, in language similar to that used by the Court of Appeals here, that every reasonable doubt should be resolved against the defendant.[3]

It is also worthy of note that the trial court, which the the Court of Appeals affirmed on the question of validity, did not mention a burden of reasonable doubt. It held the plaintiff valid because, "Bethlehem has failed to overcome the presumption of validity . . ." (R. 610).

Surely this case does not meet the qualification for granting writ of certiorari as set forth by Mr. Justice Taft in *Layne & Bowler Corporation* v. *Western Well Works*, 261 U.S. 387, 393, 67 L. Ed. 712, 714, that this Court:

> ". . . be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals."

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[3] Lorenz v. F. W. Woolworth Co. (2nd Cir. 1962) 305 F. 2d 102, 105; Crosley Corp. v. Westinghouse Electric & Mfg. Co. (3rd Cir. 1945) 152 F. 2d 895, 904; Kraft Foods Co. v. Walther Dairy Products (7th Cir. 1956) 234 F. 2d 279, 282, cert. den. 352 U.S. 926, 1 L. Ed. 2d 161; Ezee Stone Cutter Mfg. Co. v. Southwest Industrial Products (8th Cir. 1958) 262 F. 2d 183, 188; G. H. Packwood Mfg. Co. v. St. Louis Janitor Supply Co. (8th Cir. 1940) 115 F. 2d 958, 964; Strong-Scott Mfg. Co. v. Weller (8th Cir. 1940) 112 F. 2d 389, 394; Donner v. Sheer Pharmacal Corp. (8th Cir. 1933) 64 F. 2d 217, 221, cert. den. 290 U.S. 658, 78 L. Ed. 570; Moon v. Cabot Shops, Inc. (9th Cir. 1959) 270 F. 2d 539, 541, cert. den. 361 U.S. 965, 4 L. Ed. 2d 546; Patterson-Ballagh Corp. v. Moss (9th Cir. 1953) 201 F. 2d 403, 406; Oxnard Canners v. Bradley (9th Cir. 1952) 194 F. 2d 655, 658 cert. den. 343 U.S. 978, 96 L. Ed. 1370.

To the same effect are *N.L.R.B.* v. *Pittsburgh S.S. Co.*, 340 U.S. 498, 502, 95 L. Ed 479, 482; *Rice* v. *Sioux City Cemetery*, 349 U.S. 70, 79, 99 L. Ed. 897, 904; *Keller* v. *Adams-Campbell Co.*, 264 U.S. 314, 319, 68 L. Ed. 705, 708.

It is noted that in its petition for rehearing to the Court of Appeals Bethlehem did not question the Court's affirmance of validity and in the footnote to page 1 of that petition Bethlehem stated:

> "In confining this Petition for Rehearing to the infringement issue, appellee is following the better practice of confining its scope to matters believed to have been overlooked or misapprehended by the Court."

At that time Bethlehem apparently did not consider that the Court of Appeals had "overlooked or misapprehended" anything with respect to validity.[4]

There Is No Conflict Between The Decision In This Case And Decisions Of This Court And Other Courts Of Appeals With Respect To The Holding Of Infringement By The Court Of Appeals For the Fifth Circuit.

Bethlehem's whole premise, which is erroneous, is that the Court of Appeals based its decision of infringement upon conflicting testimony and asserts that the Court of Appeals therefore could not reverse the finding of non-infringement without applying the clearly erroneous rule. Bethlehem's difficulty is that the Court of Appeals did not base its opinion of infringement on conflicting testimony but instead based it upon stipulations and admissions. (323 F. 2d 950, 951)

[4] It is believed that no reply is needed to Bethlehem's accusation of bias on the part of the Court of Appeals for the Fifth Circuit. (Petition p. 20)

Graver Mfg. Co. v. *Linde Co.*, 339 U.S. 605, 94 L. Ed. 1097, does not stand for the proposition that in all instances a determination of infringement, including a determination of equivalence, is a question of fact and Bethlehem apparently does not so contend for in the second of its "Questions Presented" (Petition p. 3) and in its "Reason 3" (Petition p. 21) Bethlehem urges the existence of conflicting testimony. As shown above no conflict existed on the controlling facts.

In *Sanitary Refrigerator Co.* v. *Winters*, 280 U.S. 30, 36, 74 L. Ed. 147, 153, this Court held:

> ". . . Furthermore, upon the undisputed evidence the question of infringement resolves itself in each case into one of law, depending upon a comparison between the structure disclosed on the face of the patent and the device shown in the Dent latch, and the correct application thereto of the rule of equivalency. Compare Singer Mfg. Co. v. Cramer, 192 U.S. 265, 275, 48 L. Ed. 437, 443, 24 Sup. Ct. Rep. 291."

The Fifth Circuit is only one of several circuits which has held since the *Graver* case that where there is no dispute as to the controlling facts upon which infringement is to be determined the Court of Appeals can review the decision of the trial court free of the clearly erroneous rule.[5] There is no conflict.

In view of the stipulations of the parties previously referred to herein a more perfect situation for review by a

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[5] Plax Corp. v. Precision Extruders, Inc. (3rd Cir. 1957) 239 F. 2d 792, 795; Kiwi Coders Corp. v. Aero Tool & Die Works (7th Cir. 1957) 250 F. 2d 562, 568; Plax Corp. v. Elmer E. Mills Corp. (7th Cir. 1953) 204 F. 2d 302, 308; Del Francia v. Stanthony Corp. (9th Cir. 1960) 278 F. 2d 745, 748; Hansen v. Colliver (9th Cir. 1960) 282 F. 2d 66, 69; Kwikset Locks, Inc. v. Hillgren (9th Cir. 1954) 210 F. 2d 483, 488, 489, cert. den. 347 U.S. 989, 98 L. Ed. 1123, and 348 U.S. 855; 99 L. Ed. 673, reh. den. 348 U.S. 852, 99 L. Ed. 671; Kemart Corp. v. Printing Arts Research Laboratories (9th Cir. 1953) 201 F. 2d 624, 627.

Court of Appeals of the lower court's decision on infringement can hardly be imagined. However, Bethlehem seems to assert that for the Court of Appeals to have concluded that certain structure and operation stipulated to exist in Mr. Gus II are the equivalent of certain structure and operation of claims 1 and 10 of the patent in suit there must also be a stipulation between the parties that these matters are equivalents. Such an occurrence in litigation cannot be expected and was not present in the cases cited in the footnote to the previous paragraph. If Bethlehem's contention were correct the rule of those cases could never be applied.

CONCLUSION

WHEREFORE, premises considered, Respondent prays that the petition for certiorari be denied.

Respectfully submitted,

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